No. 89-1371

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In the Supreme Court of the United States

OCTOBER TERM, 1989

DAVID R. WEBB COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board reasonably concluded that, in the circumstances of this case, petitioner was obligated to reinstate economic strikers to positions substantially equivalent to those they had held before the strike, when petitioner had earlier rehired those employees in a lower-level position and then discharged them because of deficiencies in their performance in that position.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 888 F.2d 501. The decision and order of the National Labor Relations Board (Pet. App. 23a-24a), including the decision of the administrative law judge (Pet. App. 25a-44a), is reported at 291 N.L.R.B. No. 36.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1989. A petition for rehearing was denied on December 7, 1989 (Pet. App. 45a). The petition for a writ of certiorari was filed on February 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures and sells lumber products. On July 28, 1986, petitioner's production and maintenance employees began an economic strike. On November 3, 1986, the employees who remained on strike unconditionally offered to return to work. By then, many of their positions had been filled by permanent replacements, and unreinstated strikers were placed on a preferential recall list, arranged according to qualifications and seniority. Pet. App. 2a, 26a-27a.

By mid-February 1987, former strikers Alice Hill, Rex Young, and Eugene McGaha had reached the top of the list. At that time, neither their pre-strike jobs nor substantially equivalent jobs were available. Petitioner offered Hill an entry level position, which she accepted, as a "dryer-feeder" operator on the second shift. Hill reported to work on February 17. She immediately experienced difficulty in performing the work, and continued to be unsuccessful after a supervisor had a platform constructed to compensate for her lack of height.[1] She was terminated at the end of the shift. Pet. App. 2a, 28a-29a.

Petitioner then recalled Young, who was next on the recall list. He accepted the dryer-feeder position and performed better than Hill, but had difficulty in

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[1] Dryer-feeder operators are required to load pieces of wood veneer on a mechanical lift, raise the lift to a height of 4 to 4½ feet, and manually flip the veneer upwards to a vacuum pump which directs the veneer onto a belt. Pet. App. 28a. Hill is 4'11" tall and was 61 years old in February 1987. She had worked for petitioner for 12-13 years. Her pre-strike job as a labeler, which she had held for three to four years, required no heavy lifting or hand-eye coordination. Pet. App. 28a.

feeding the vacuum pump.[2] Young was terminated on his second day, for poor performance. Petitioner next contacted McGaha, who before the strike had driven a pickup and flatbed truck, and sometimes operated a forklift. McGaha had difficulty both in loading the lift and in feeding the vacuum pump.[3] He was terminated after working two shifts. Pet. App. 2a-3a, 30a-32a.

Thereafter, the positions that Hill and Young had held before the strike became vacant, and there were also openings in positions comparable to the one that McGaha had held. The vacant positions were not offered to the terminated employees, and were awarded to junior employees. Pet. App. 32a.

2. Affirming findings and conclusions entered by an administrative law judge, the Board held that petitioner had violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by failing to offer to reinstate Hill, Young, and McGaha to the positions they had held before the strike or to substantially equivalent positions when such positions became available. Pet. App. 23a-24a, 38a-39a. It ordere petitioner, *inter alia*, to offer Hill and Young reinstatement to their pre-strike positions and to offer McGaha reinstate-

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[2] The feeding process involved flipping individual sheets up with the fingers. Pet. App. 28a. Young had no thumbnails. C.A. App. 142-143. Young had been employed by petitioner for 12 years. For the two or three years preceding the strike, he had worked as a "flitch cleaner," a job that required placing split logs on a chain conveyor with the assistance of another employee. Pet. App. 30a.

[3] McGaha testified that he had a 15-20% disability in his left arm as a result of surgery the previous year. Pet. App. 31a-32a & n.4.

ment to his pre-strike position or a substantially equivalent position. *Id.* at 24a, 40a-41a.

The ALJ applied the analysis outlined in *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970), in which the Board held that economic strikers who apply for reinstatement at a time when their positions are filled by permanent replacements "(1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons." Pet. App. 33a-34a. The ALJ noted that in this case it was undisputed that the employees in question had not been recalled to positions they held before the strike or to substantially equivalent positions. *Id.* at 34a. He concluded that the employees' inadequate performance in the positions to which they had been recalled was not a legitimate and substantial business reason for refusing to offer them reinstatement to the positions they had previously held. *Id.* at 36a-37a. In the alternative, the ALJ found that petitioner had discriminated against the three employees at issue by failing to follow its past practice of transferring individuals who could not perform a given job to another position that they could perform. *Id.* at 37a.

In affirming the ALJ's decision, the Board acknowledged that petitioner was not obligated to retain the three employees in the position in which they had failed to perform satisfactorily. Pet. App. 24a n.3. Nevertheless, the Board concluded, deficiencies in their performance in that job did not sufficiently

justify petitioner's failure to honor those employees' presumptive right to reinstatement in their pre-strike or equivalent positions. *Ibid.*

3. The court of appeals enforced the Board's order. Pet. App. 1a-22a. The court rejected petitioner's contention that an employer's obligations to striking employees are discharged when an employee accepts reinstatement to any position for which he or she is qualified. Noting that the Board "has consistently taken the position that employers must reinstate striking employees to their former or substantially equivalent positions before the employer's *Laidlaw* obligations are satisfied" (*id.* at 9a), the court concluded that this interpretation of the Act "is consistent with the policies and the language of the Act, and with the case law thus far" (*id.* at 10a).

The court explained that one of the policies of the Act is "to protect the rights of the employees to organize and strike" and that "employees will be deterred from striking if their employer can reinstate them to a lower-level position and thereby fulfill his [reinstatement] obligations." Pet. App. 11a. The Board's position, the court continued, was also consistent with the "theory behind [*NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967)] and *Laidlaw*," which is that "employees should not be penalized for striking, and they remain employees regardless of such action." Pet. App. 12a. Under this theory, the court of appeals reasoned, "a returning striker's right should not depend on the coincidence of which jobs may be open when he reaches the top of the recall list." *Ibid.* The court added that "[a]llowing the employer to satisfy its *Laidlaw* obligation by offering a striker a position which is not the one the striker is best able to perform (in contrast to his prestrike

position) could allow a system which forces the striker to accept a position at which he is predestined to fail and thus lose his original *Laidlaw* rights in the process." *Id.* at 16a.

The court also held that petitioner had not carried its burden of showing "a legitimate and substantial business justification for removing the employees from the recall list and refusing to place them in their former or substantially equivalent positions when such became available." Pet. App. 16a-17a. While (like the Board) the court acknowledged that petitioner had a legitimate reason for terminating the employees in question from the dryer-feeder position, the court found that their inadequate performance in that position "was not a sufficient reason for removing the employees from the eligibility list for their prestrike positions or their substantial equivalent." *Id.* at 17a.

Finally, the court rejected petitioner's contention that Section 10(c) of the Act, 29 U.S.C. 160(c), foreclosed the relief the Board had awarded. The court interpreted Section 10(c), which provides that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged * * * for cause," to prohibit the Board "from ordering employees reinstated to the positions from which they were discharged" (Pet. App. 21a). The court emphasized that the Board had not required reinstatement to the dryer-feeder position and that the basis for their terminations—"the employees' inability to perform in the lower-level positions"—was "not related" to the positions to which they were to be reinstated. *Ibid.*

At several points in its opinion, the court emphasized the limits on its decision. The court "[did] not

question [petitioner's] act of discharging the employees from the dryer-feeder position." Pet. App. 12a n.7; see *id.* at 13a, 17a. It stressed that it had not "immunize[d]" the employees in question from discipline for inadequate job performance, specifically noting that after the employees had been reinstated to their prestrike or substantially equivalent positions, they could be discharged "for their inability to perform the job or for other reasons constituting cause." *Id.* at 14a. Finally, the court twice stated that its decision was not "open-ended" and that "[a]dditional factual variations will present related questions" that it need not address until after the Board has had an opportunity to rule on them. *Id.* at 16a; see *id.* at 11a & n.7.[4]

ARGUMENT

As the court of appeals held, the Board's interpretation of the National Labor Relations Act in the context of this case—under which a striking employee who has been replaced during the strike is ultimately entitled, absent a countervailing legitimate business justification, to reinstatement in the same or a substantially equivalent position when an opening materializes—is reasonable and consistent with the language and policies of the statute. Moreover, there is no conflict warranting this Court's review between the decision in this case and decisions of other courts of appeals.

1.a. Under Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), the statutory definition of "employee" includes "any individual whose

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[4] On December 18, 1989, the court of appeals denied petitioner's request for a stay of its judgment enforcing the Board's order. On December 29, 1989, Justice Stevens denied an application to stay the mandate of the court of appeals.

work has ceased as a consequence of, or in connection with, any current labor dispute * * * and who has not obtained any other regular and substantially equivalent employment." Thus, an individual whose position is filled with a permanent replacement while he or she participates in a strike retains the rights that the Act confers on employees. In *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), this Court recognized that when an employer refuses to reinstate a striking employee who has offered unconditionally to return to work, "the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by §§ 7 and 13 of the Act [29 U.S.C. 157, 163]." "Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice." 389 U.S. at 378. The absence of anti-union animus is no defense. Given the effect of non-reinstatement on "important employee rights," that conduct "constitutes an unfair labor practice without reference to intent." *Id.* at 380.

Fleetwood Trailer did not address the precise question presented here, which is whether an employer satisfies his obligation to striking employees by reinstating them to positions that are substantially less desirable than those the employees held before the strike. However, the Board has ruled in a variety of settings that the presumptive right to reinstatement is a continuing one and that employees are ultimately entitled to jobs that are the same as or substantially equivalent to those they held before the strike. See, *e.g.*, *Laidlaw Corp.*, 171 N.L.R.B. at 1369 (economic striker's preferential right to reinstatement is not extinguished because, at the time he applies, his position is occupied by a permanent re-

placement); *H & F Binch Co.*, 188 N.L.R.B. 720, 725 (1971) (acceptance of interim non-equivalent employment does not extinguish striker's right to former or equivalent position), enforced in pertinent part, 456 F.2d 357 (2d Cir. 1972); *Arlington Hotel Co.*, 273 N.L.R.B. 210, 217 (1984) (striker may refuse non-equivalent position without losing preferential reinstatement right), enforced, 785 F.2d 249 (8th Cir.), cert. denied, 479 U.S. 914 (1986); *Rockwood & Co.*, 281 N.L.R.B. 862, 877-878 (1986) (same), enforced, 834 F.2d 837 (9th Cir. 1987); *Coca-Cola Bottling Co.*, 269 N.L.R.B. 1101, 1102 (1984) (striker may accept and then relinquish non-equivalent interim employment without losing entitlement to pre-strike or equivalent position). Cf. *Custom Craft Mfg. Co.*, 212 N.L.R.B. 255, 258-259 (1974) (holding unlawful the reinstatement of unfair-labor-practice strikers to non-equivalent positions followed by discharge of those who were unable to perform).

b. In these various factual settings, the Board has adhered to essentially the same basic principle. When an employer refuses without a legitimate business justification to reinstate striking employees to positions substantially equivalent to those they held before a strike, the effect is to deter the exercise of the employees' statutory rights. In *Fleetwood*, this Court recognized that denying striking employees reinstatement after the conclusion of a strike will discourage employees from exercising their rights to organize and strike. 389 U.S. at 378. As the Board has held, that reasoning extends to cases in which strikers are reinstated, but only to jobs substantially less desirable than those they had held before participating in the strike. The threat inherent in petitioner's position—that a striking employee may be

relegated to any position for which he or she is believed to be qualified, no matter how menial, low-paying, or poorly suited to the employee's capabilities —would undoubtedly be a powerful deterrent to the exercise of the right to strike. To protect employees from that threat, it is entirely reasonable to require the employer to demonstrate a legitimate and substantial business justification for a refusal to reinstate a striking employee to his pre-strike position or one equivalent to it, even if that employee has been offered reinstatement to a lower-level position and has either accepted or rejected it.

Petitioner suggests that when a striking employee has accepted a lower-level position and has been terminated for cause, the employer's obligations should be at an end. See Pet. 16. However, as the Seventh Circuit recognized, that approach would subject employees to the threat of a penalty for the exercise of their right to strike (Pet. App. 11a):

> If lower-level positions are all that are available to an employee when he reaches the top of the recall list, he is likely to feel financial pressure (particularly after a long strike where most vacancies are filled) to take the position rather than wait until a position substantially equivalent to his pre-strike job becomes available. However, if accepting a lesser job means he may lose his right to reinstatement to his previous position if he is unable to perform satisfactorily, his options are limited. To ensure that the striker is not penalized for engaging in protected activity, we conclude that under the policies behind the Act, the process of reinstatement does not end until the employee receives his original position or one substantially equivalent to it.

As the facts of this case pointedly demonstrate, a termination for cause from one job does not neces-

sarily constitute a legitimate and substantial justification for refusing to reinstate a striker to his or her original position. See Pet. 16. Each of the employees in question had performed satisfactorily in their pre-strike positions for years (see Pet. App. 28a-31a), and the difficulties they experienced in their brief attempts to perform the dryer-feeder job did not suggest that they would be unable to resume their past employment in an equally satisfactory manner. When there is no showing that the employee's poor performance in an interim job has any bearing on his suitability to perform his pre-strike (or substantially equivalent) position, a refusal to offer the employee reinstatement in that position interferes with the exercise of the right to strike. The Board's solution to the problem presented by cases of this type—to require the employer to demonstrate a legitimate and substantial basis for refusing to return the employee to the position he occupied before the strike or to a substantially equivalent position—is an entirely appropriate accommodation of the policies embodied by the Act.[5]

c. Petitioner's contention that the Board's approach unjustifiably interferes with employer prerogatives

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[5] An employer may offer former strikers positions for which they are qualified, even if those positions are not substantially equivalent to those the employees have previously held. However, the fact that the employee may accept such an offer and acquire the protections of the Act with respect to that position does not mean he may be deprived of rights derived from his prior employment. Compare Pet. 18-19. Reinstatement in an interim position is a partial response to the risk that the right to strike may be deterred; the rights that the employee enjoys in the interim position are not a complete substitute for the protections the Board has reasonably determined are necessary to safeguard the right to strike.

(see Pet. 16, 19-22) rests upon a misreading of the Board's and the court's decisions. Obviously, the decision below does not "establish[]" that an employer who recalls an employee to an interim position "has no right to discharge that employee, for *any* reason, from the time the employee enters the work force until he obtains his former or a substantially equivalent job" (Pet. 19). The court of appeals "readily conced[ed]" that employers have the right to "discharge employees who are performing unsatisfactorily" (Pet. App. 11a-12a n.7), and nothing in the Board's decision suggests otherwise. Nor does the decision below establish, as petitioner claims, that an employer would be required to reinstate former strikers terminated from jobs not equivalent to their prior positions for such reasons as "absenteeism; acts of theft or violence; possession of narcotics; or even sabotage" (Pet. 20). The Board and the court found only that petitioner had failed, on the facts of this case, to show that the terminations of the employees in question justified a refusal to reemploy them in their pre-strike or equivalent positions. Those decisions do not suggest that a dismissal for cause will never provide such a justification.

The narrow legal issues presented by this case are whether an employer must demonstrate a legitimate and reasonable business justification for refusing to offer former strikers positions that are the same as or equivalent to those they occupied before a strike and whether a dismissal for cause in a different position invariably supplies such a justification. The Board's answers to those questions effect a reasonable "balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 378. Accordingly, the court of appeals

properly deferred to the Board's interpretation of the statute.

2. Contrary to petitioner's contention (Pet. 8-13), there is no conflict between the decision in this case and the Sixth Circuit's decision in *NLRB* v. *American Olean Tile Co.*, 826 F.2d 1496 (1987), calling for this Court's review. In *American Olean*, 12 economic strikers who offered to return to work before the end of the strike were placed in interim positions at a less desirable plant than the one in which they had worked prior to the strike. When openings occurred in the more desirable plant, the employer—in accordance with an undertaking it had made during the strike to reinstate strikers in the order in which they had offered to return to work—transferred them to those positions. Employees with more seniority who had worked at the more desirable plant before the strike and had not yet been reached on the employer's list argued, however, that they were entitled to these openings.

The Board agreed, holding that, since none of the employees in question had been fully reinstated, the preference based upon the order of the strikers' offers to return to work tended to discriminate against the employees who had remained off the job until the end of the strike and thus was inherently destructive of the right to strike. See 826 F.2d at 1499. The Sixth Circuit denied enforcement of the Board's decision, holding that the transfer of the 12 employees who had earlier accepted jobs at the less desirable plant was not unlawful discrimination based upon the exercise of rights protected by the Act. *Id.* at 1502. The Sixth Circuit rejected the Board's reasoning, finding that the 12 employees who received transfers had been reinstated "when they were recalled to work" at the less desirable plant. The court observed

that "[t]he law requires reinstatement when a vacancy occurs for which an offeror is qualified, whether in his previous position or a substantially equivalent one, or not" and an employee does not even have the option of declining an offer of reinstatement to a nonequivalent position. *Id.* at 1501.

The Sixth Circuit's view of strikers' rights, which petitioner declined to advocate in the court of appeals (Pet. App. 15a n.9), is narrower than that of the Board and of the court of appeals in this case. However, this difference does not warrant this Court's review. Unlike the case at bar, *American Olean* did not squarely present the issue of the full measure of reinstatement rights held by former strikers who had returned to less desirable jobs. In that case, the employer specifically undertook to reinstate strikers to their pre-strike or equivalent positions and did not seek to limit them, as petitioner's argument would, to less desirable positions for which they were minimally qualified. Thus, there is no conflict between the holding in *American Olean*, which was that the employer could abide by the chronological system that it had adopted during the strike to determine the order in which employees would be reinstated in their pre-strike or equivalent positions, and the holding in this case, which is that an employer bears the burden of justifying an outright refusal to reinstate striking employees to positions of that type. The Sixth Circuit might well take a different view of a striker's reinstatement rights if the issue were presented in a case in which an employer was seeking to *limit* employees to positions inferior to those they had occupied during a strike.[6]

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[6] Moreover, the majority in *American Olean* did not address the conflict between its reasoning and a long line of Board

3. Petitioner also contends that requiring reinstatement of the employees in question violates Section 10(c) of the Act. Pet. 14. However, as the court of appeals explained, Section 10(c) only prohibits an order requiring reinstatement of those employees to the dryer-feeder job from which they were terminated. Pet. App. 21a. The unfair labor practice here was *not* the discharge for failure to perform as dryer-feeders, but termination of the former strikers' preferential rights to reinstatement to their own, or substantially equivalent, jobs. Where, as here, the discharge for cause bore no relation to the employees' ability to perform their pre-strike jobs, Section 10(c) does not preclude the Board from re-

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authority and decisions by other courts of appeals. See pp. 8-9, *supra*.

Petitioner is mistaken in its assertion (Pet. 11-12) that *NLRB* v. *Rockwood & Co.*, 834 F.2d 837 (9th Cir. 1987), and *Medallion Kitchens, Inc.* v. *NLRB*, 811 F.2d 456 (8th Cir. 1987), provide no support for the Board's approach to reinstatement rights. In *Rockwood*, the court expressly held that where an interim job offered to an unreinstated striker "was not substantially equivalent to [his] former position, he was entitled to accept or reject it without affecting his status as an employee under section 152(3) or his right to reinstatement." 834 F.2d at 841-842. In *Medallion Kitchens*, the court noted that "[a]bsent a substantial and legitimate business justification, an employer's obligation is satisfied only upon an offer to the former striker of a substantially equivalent job." 811 F.2d at 459. The holding in *Medallion Kitchens*—that an employer unlawfully failed to recall employees to certain temporary jobs filled by new hires because those jobs were substantially equivalent to the unreinstated employees' pre-strike jobs—was also completely consistent with the court of appeals' reasoning here. 811 F.2d at 459-460.

quiring restoration of the strikers' preferential rights to their former or substantially equivalent positions.[7]

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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MAY 1990

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[7] As the legislative history makes clear, Section 10(c) was designed to prevent the Board from reversing discharges for cause. The Conference Report explained that "employees who are discharged or suspended for interfering with other employees at work * * * or for engaging in activities * * * contrary to shop rules * * * or for other cause * * * will not be entitled to reinstatement." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 55 (1947). Similarly, the House Report noted that the provision was "intended to put an end to the belief, now widely held and justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plant, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." H.R. Rep. No. 245, 80th Cong., 1st Sess. 42 (1947).

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